> actually consider the *Booker* issue on the ground that it was not raised when we issued that first decision. As I have explained elsewhere, it is also a very bad rule, as it is not only inconsistent with Supreme Court precedent and the law of every other circuit, but also encourages defendants-appellants to raise frivolous claims that are squarely foreclosed by circuit and Supreme Court precedent on the off chance that an unanticipated decision will make them suddenly viable. See *United States v. Levy*, 391 F.3d 1327, 1335-51 (11th Cir. 2004) (Tjoflat, J., dissenting the denial of Rehearing En Banc) . . . ." *United States v. Vanorden, supra*, Tjoflat, Circuit Judge, specially concurring.

Here, Petitioner tried repeatedly, and in a timely manner, to raise the *Blakely/Booker* issues. He filed a "Motion for Leave to Supplement Appellant's Opening Brief Under *Blakely v. Washington*" [Appendix C]. Because this motion had not been acted upon by the time of the filing of his Reply Brief, he filed a *Blakely* argument in his Reply Brief [Appendix D]. The government moved to strike this argument from the Reply Brief [Appendix E]. Chambers opposed the motion noting *United States v. Sanchez, supra*, had specifically held that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum" [Appendix F]. The Eleventh Circuit, by order on September 2, 2004 [Appendix G], denied the motion for leave to supplement the brief to raise *Blakely* issues, and granted the government's motion to strike this argument from the Reply Brief.

Following this Court's decision in *United States v. Booker, supra*, Petitioner filed a motion for remand for resentencing pursuant to *Booker*. [Appendix H]. These motions were summarily rejected by the Eleventh Circuit:

> "Chambers has continued to file motions with this Court asking to be resentenced in light of *Booker*. Because the *Booker* issue was not raised in Chambers' initial brief to this Court we do not consider it." Memorandum Opinion [Appendix A], footnote 3.

This rule, which is unique in the federal circuits, arbitrarily and unconstitutionally denies criminal defendants access to new decisions from this Court, applicable to all cases on direct appeal, based solely on the fortuity of the filing date of the Opening Brief. It is a denial of due process, and one which substantially affects the sentence of this Petitioner.

STATEMENT OF THE CASE

Martin Chambers was indicted in the United States District Court for the Southern District of Florida, and charged with conspiracy to launder purported drug money, and four counts of money laundering in violation of Title 18 U.S.C. §§1956(h) and 1956(a)(3)(B). Following conviction by a jury, he was sentenced to a term of incarceration of 188 months, the bottom of guideline level 36.[2]

The district court denied a motion for downward departure based upon personal characteristics of the appellant, including his having rescued several individuals at the risk of his own life, and concluded that these factors did not justify a downward departure. However, the court noted:

> "The Court: Well, you know, the guidelines don't ask us to look at whether or not the person is outside the heartland of the guidelines; and that is one of the problems with the guidelines, which is that the more complex the individual is who is before

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[2] The calculations made by the district court were as follows:

1. Base offense level §2S1.1(a)(2) [including the value of the laundered funds as $700,000]	22
2. Knowledge that the laundered funds were proceeds of drugs, §2S1.1(b)(1) and (a)(2)	+6
3. Conviction under 18 U.S.C. §1956, §2S1.1(b)(2)(B)	+2
4. Sophisticated laundering pursuant to U.S.C. §1.1(b)(3)	+2
5. Role in the offense, §3B1.1(c)	+2
6. Adjustment for obstruction of justice, §3C1.1	+2

> the court, *the less adequate the guidelines are to address what the appropriate punishment might be.*" Transcript 12-5-2003, page 93, lines 18-24 [Appendix G] (emphasis added).

In addition, the court refused the government's request to impose a sentence at the upper end of the guideline level. These factors indicate a "reasonable probability of a different result if the guidelines had been applied in an advisory instead of binding fashion by the sentencing judge." *United States v. Curtis*, 400 F.3d 1334, 1336 (11th Cir. 2005) (per curiam) quoting *United States v. Rodriguez*, 398 F.3d 1291 (11th Cir.), *cert denied*, __ U.S. __, 125 S.Ct. 2935 (2005).

Chambers appealed to the United States Court of Appeals for the Eleventh Circuit, and filed his Opening Brief in a timely fashion on April 13, 2004. This Court decided *Blakely v. Washington*, 542 U.S. __, 124 S.Ct. 2531 (2004) on June 24, 2004, two months *after* the filing of the Opening Brief. *Blakely* applied *Apprendi v. New Jersey*, 530 U.S. 466 (2000) in a Washington State sentencing context to enhancements to a sentence based upon facts not considered or found by a jury. Prior to that time, and before the petitioner's sentencing in the district court, the Eleventh Circuit, as had every other circuit, determined *specifically* that *Apprendi* only applied to sentencing facts "that increased the penalty for a crime beyond the prescribed statutory maximum." *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001).

In response to *Blakely*, petitioner filed on July 2, 2004, a "Motion for Leave to Supplement Appellant's Opening Brief under *Blakely v. Washington*" [Appendix C]. The government opposed the filing of this brief by a pleading filed on or about July 19, 2004. No ruling was entered regarding

this motion, however, by the time appellant timely filed his Reply Brief on July 22, 2004. In that Reply Brief [Appendix D] Chambers argued as Argument V that "The appellant must be resentenced because substantial upward adjustments were found against him in violation of *Blakely v. Washington*, 2004 WL. 1402697 (June 24, 2004)".

The United States moved by a motion filed August 2, 2004 to strike this argument from the brief. [Appendix E]. Chambers opposed the motion to strike in a pleading filed August 9, 2004. [Appendix F]. In that pleading, petitioner specifically directed the Circuit's attention to its *Sanchez* decision, which made raising the *Apprendi* claim both at the sentencing and in the Opening Brief, which occurred after *Sanchez*, but before *Blakely*, completely futile.

Petitioner further noted that *Blakely* established a new rule of constitutional law which this Court required to be applied "to cases pending on direct review". See *Griffith v. Kentucky*, 479 U.S. 314, 322 (1987).

By order of September 2, 2004, the Eleventh Circuit denied the motion for leave to supplement the brief to raise the *Blakely* issue, and granted the government's motion to strike this argument from the appellant's Reply Brief. [Appendix G].

On January 12, 2005, this Court decided *United States v. Booker*, 543 U.S. __, 125 S.Ct. 738 (2005). This Court recognized in *Booker* that "we must apply today's holding – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to all cases on direct review." 125 S.Ct. at 769. With regard to cases then on appeal, the Court concluded the a "plain error" standard of review is to be applied. *Id.*

Petitioner, on March 14, 2005 filed a Motion for Remand for Resentencing pursuant to *Booker*. [Appendix H].

In its unpublished Opinion of June 24, 2005, page 16, n.3, the Eleventh Circuit, recognized a portion of this history, and refused to consider the *Booker* issue, because *Booker* was "not raised in Chambers' initial brief to this court".

A timely Petition for Rehearing again claimed that the court's refusal to consider the *Booker/Blakely* issued denied petitioner due process and equal protection of the law. [Appendix I]. That Petition for Rehearing was denied without comment on August 9, 2005. [Appendix B].

REASONS FOR GRANTING THE WRIT

I. THE "INITIAL" BRIEF RULE OF THE ELEVENTH CIRCUIT COURT OF APPEALS PRESENTS AN UNCONSCIONABLE AND UNCONSTITUTIONAL BAR TO ACCESS TO DECISIONS OF THIS COURT WHICH ARE REQUIRED TO BE APPLIED TO ALL CASES STILL ON DIRECT APPEAL

1. The "initial brief" rule has been severely criticized even within the Eleventh Circuit, is unique among the circuits, denies petitioners such as Chambers due process and equal protection of the law, and presents a deep and significant conflict among the circuits.

The Eleventh Circuit stands alone in refusing to hear issues which were not raised in an initial brief. While the propriety of the general application of such a rule is highly questionable, its application to a new rule established by this Court and previously rejected not only by the Eleventh Circuit, but by every circuit in the United States, is irrational and unconstitutional.

Not only does this rule deprive litigants of their due process and equal protection rights, but it imposes upon them the impossible burden of raising every imaginable issue, although settled by every circuit in the land, on the off chance that this Court, or the Eleventh Circuit, might later decide differently. In the Eleventh Circuit, a litigant would be well advised to include an argument which contains a laundry list of every rational and irrational argument which could be made. Such a result is absurd.

Because of the abject irrationality of the rule, it is not surprising that it has come under severe and persistent attack even within the Eleventh Circuit. Frustrated judges from that circuit, bound by *stare decisis*, rail against the inequities of the rule, but are powerless to expunge it. It is clear that this salutary effect can only be accomplished by this Court.

The use of the "initial brief" rule to block claims under *Apprendi, Blakely*, and *Booker* is consistent throughout the Eleventh Circuit.

In *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001) on denial of *en banc*, previous opinion 242 F.3d 989 (11th Cir. 2001) the decision in *Apprendi* was raised in a Petition for Rehearing which was denied. This Court then vacated and remanded, leading to a reinstatement of the earlier decision in *United States v. Ardley*, 242 F.3d 989 (11th Cir. 2001). A Suggestion for Rehearing En Banc was then denied. *United States v. Ardley*, 273 F.3d 991 (11th Cir. 2001). Four judges concurred in the denial (Judges Carnes, Black, Hull and Marcus), while two dissented (Judges Tjoflat and Barkett).

Similarly, in *United States v. Ford*, 270 F.3d 1346 (11th Cir. 2001) *Apprendi* was raised in a Petition for Rehearing which was denied. This Court vacated and remanded, and the original result was reinstated pursuant to the initial brief rule.

The *Apprendi* issues were finally put to rest by the circuit in *United States v. Sanchez*, 269 F.3d 1250 (11th Cir. 2001). However, a similar fate has befallen defendants attempting to raise *Blakely*.

In *United States v. Levy*, 391 F.3d 1327 (11th Cir. 2004) on denial of *en banc*, previous opinion 379 F.3d 1241 (11th Cir. 2004), *Blakely* was raised in a Petition for Rehearing.

The matter was vacated and remanded by this Court, and the original decision was reinstated. In this case, the denial of the *en banc* suggestion led to four concurring judges [Judges Carnes, Hull, Anderson and Pryor] and two dissenters [Judges Tjoflat and Wilson].

Booker fared no better.

In *United States v. Verbitskaya*, 406 F.3d 1324, (11th Cir. 2005) a motion to file a supplemental brief under *Blakely* was denied. Supplemental authority submitted after *Booker* was decided was rejected under the initial brief rule.

In *United States v. Vanorden*, __ F.3d __, No. 03-11083 (11th Cir., June 30, 2005) the earlier decision of the circuit was vacated and remanded for further consideration under *Booker*. Under the initial brief rule, and over a sharp dissent from Judge Tjoflat, the original decision was reinstated. Similar results occurred in *United States v. Bordon*, __ F.3d __, No. 04-10654 (11th Cir., August 25, 2005), at n.1, *United States v. Dockery*, 401 F.3d 1261 (11th Cir. 2005), and *United States v. Smith*, __ F.3d __, No. 03-15299 (11th Cir., July 18, 2005).

Application of this rule to Chambers, and these other appellants, raises serious due process and equal protection concerns.

2. This court in *Booker* was unequivocal in the reach of its application.

> "As these dispositions indicate, we must apply today's holdings – both the Sixth Amendment holding and our remedial interpretation of the Sentencing Act – to

> all cases on direct review. See *Griffith v. Kentucky*. 479 U.S. 314, 328 (1987)." *United States v. Booker*, 125 S. Ct. at 769.

This Court relied upon the longstanding rule of *Griffith v. Kentucky* that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases . . . pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past". 479 U.S. 314 at 328 (1987).

The imperative for retroactive application found two related bases in *Griffith*. First, the "integrity of judicial review requires that we apply that rule to all similar cases pending on direct review." *Id.* at 322-323.

"Second, selective application of new rules violates the principle of treating similarly situated defendants the same." *Id.*

These concerns led to stinging dissents by Judge Tjoflat, joined in by other members of the court, in *United States v. Levy*, *supra*, 391 F.3d 1327, 1335 at 1337 (11th Cir. 2004), and *United States v. Vanorden*, *supra*.

It is particularly abhorrent that Chambers may be suffering under an illegal sentence which, because of its length [188 months], (much of which was based upon facts never found by a jury, and improperly calculated under *Booker*), and his age [65], may well be a life sentence. He has been denied a substantive constitutional protection by the application of a procedural rule. He, like others similarly situated, is therefore deprived of due process.

The equal protection claims are equally compelling. In terms of the right to have this issue heard, how is Chambers rationally differentiated from an individual litigant whose Opening Brief was filed approximately 70 days later, and thus could have included *Blakely*, and taken advantage of *Booker*? There is no rational distinction between these individuals. There is only the luck of timing.

Therefore, with regard to similarly situated litigants within the Eleventh Circuit, he is denied equal protection of the law.

But it is also true that, compared to similar litigants in every other jurisdiction, he is being treated substantially differently, for no rational reason. As Judge Tjoflat noted in his dissent from the denial of *en banc* in *United States v. Levy*, *supra*, 391 F.3d 1327, 1340:

> "This continues to be the only Circuit in which 'cases are entitled to the benefit of the intervening decision *only* if: (1) the case was not yet final at the time of the intervening decision; *and* (2) the litigant presaged the intervening decision by raising the issue addressed by that decision in the litigant's brief on appeal.'" (Emphasis in original).

3. Particularly in view of the concerns expressed by the district judge in this case regarding the inadequacy of the guidelines to take into account personal characteristics of Chambers, the due process and equal protection issues presented here strongly argue in favor of a modification or a renunciation of the initial brief rule. Chambers' predicament arises because of a lack of prescience and the serendipity of

timing. The quality of criminal justice should hardly hang on such thin threads.

CONCLUSION

Petitioner Martin Chambers was sentenced in the Southern District of Florida at a time when the Eleventh Circuit, and every other Circuit, had determined that *Apprendi v. New Jersey*, *supra*, had no applicability to normal calculations under the United States Sentencing Guidelines. At his sentencing, the district court judge expressed frustration with the inability to consider certain personal characteristics of Chambers in entering the sentence. The court ultimately rejected a government request for a higher sentence, and sentenced Chambers to the low end of the applicable guideline range. A substantial portion of that guideline calculation was based on factors which, after *Booker*, would now be improper.

Chambers timely filed an Opening Brief in the Eleventh Circuit. Approximately 70 days later, this Court decided *Blakely v. Washington*, *supra*. Had Chambers been dilatory in the filing of his brief, he could have included the *Blakely* argument. Because he had acted prudently and timely, he did not. But he immediately sought, through a number of mechanisms, to raise *Blakely*. All of these efforts were blocked by the Eleventh Circuit because of the "initial brief" rule.

Ultimately, but before the decision in his case was entered, this Court decided *United States v. Booker*, *supra*. Again, Chambers sought to raise the *Booker/Blakely* issues, and again he was rebuffed by the court because of the "initial brief" rule.

The inequities of this situation are apparent. He is asked by the Eleventh Circuit to presage a change in the law which

had been rejected by every federal circuit. He is told he must be treated differently because his brief was filed 70 days before this Court's decision in *Blakely*. He is instructed that his sentencing issue, which could have a dramatic effect on his ultimate term of imprisonment, would be considered in every other federal jurisdiction but the Eleventh Circuit.

Chambers asks how this can be justified. There is no rational answer for him. Nor is there any just or legal explanation.

As has been shown, Chambers is not alone, but is one of many criminal defendants in the Eleventh Circuit suffering this fate. This Court, through a Writ of Certiorari, should direct the Eleventh Circuit, at least with regard to cases such as Chambers, to abrogate or modify its "initial brief" rule, and to give substantive consideration to petitioner's *Booker/Blakely* claims.

DATED: October 28, 2005

Respectfully submitted,

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